IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALFRED TESTA, JR.	:	**CIVIL ACTION**
and KATHRYN H. TESTA	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA and	:	
JOHN F. STREET, MAYOR, in his	:	
Official and Individual capacities	:	
and **STEPHANIE FRANKLIN-SUBER** in	:	
her Official and Individual	:	
capacities	:	**NO. 00-3890**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **May 22, 2002**

Plaintiffs Alfred Testa, Jr., ("Testa") and Kathryn H. Testa ("Mrs. Testa") filed an action against the City of Philadelphia, its Mayor, John Street ("Street"), and his former chief of staff, Stephanie Franklin-Suber ("Franklin-Suber"). On April 23, 2001, this court granted in part and denied in part defendants' motion to dismiss the complaint. Plaintiffs' remaining claims include deprivation of First Amendment rights under 42 U.S.C. § 1983 and loss of consortium against all defendants, and defamation against Franklin-Suber. This Memorandum addresses defendants' Motion for Summary Judgment on Testa's 42 U.S.C. § 1983 claim.

I. FACTS

Testa was Aviation Director for the City of Philadelphia from 1999 until March 13, 2000. As Aviation Director, he managed Philadelphia International Airport ("Airport") operations. On

February 23, 2000, he testified in a budget hearing before the Philadelphia City Council. In answer to questions from council members, Testa criticized City policy under which the City Parking Authority, rather than the Airport Authority, oversees Airport parking. Testa also criticized the Parking Authority's management of Airport parking lots. City employees in close contact with the Mayor were present at the Council hearing. On another occasion, Testa had criticized inclusion of the Airport in the City's new emergency communications system.

Approximately two weeks after giving City Council testimony, Testa was summoned to meet with Franklin-Suber, then Street's Chief of Staff, on Sunday, March 12 at 5:00 p.m. in her office. Franklin-Suber began the meeting by telling Testa the Mayor wanted his resignation immediately. Testa suggested he would resign if granted a favorable severance package, but Franklin-Suber stated that the Mayor wanted his resignation immediately. She threatened to have him escorted from the office and barred from the Airport. Testa said he needed to speak with his wife and left.

The following day, Monday, March 13, 2000, Testa went to work as usual at the Airport. At noon, Franklin-Suber phoned Testa and again demanded his resignation. Testa refused to resign absent agreement on a severance package; Franklin-Suber then told him things "would become nasty."

Testa began drafting a letter to Franklin-Suber to inquire if he had been fired. At 1:45 p.m., before he could have the letter delivered, a group of police and City officials arrived at Testa's office. The group included Police Lt. Richard Ross of the Mayor's security detail, several other police officers, the head of Airport security, and Shawn Fordham, a Mayoral employee. Fordham gave Testa a letter from Franklin-Suber telling him that, if he did not resign by 1:30 p.m., he would be fired and escorted from his office by the police before 2:00 p.m. The letter included the statement, "Let me emphasize that the immediate submission of your resignation will, in my opinion, prove to be in your personal and professional best interests."

Testa requested more time to collect his personal effects, but the request was denied by Franklin-Suber. Philadelphia police offers in plain clothes escorted Testa from his office at approximately 2:00 p.m.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate only if there are no genuine issues of material fact and evidence establishes the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff

must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-24. The non-movant must present evidence to support each element of the action for which it bears the burden of proof at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable inferences in the non-movant's favor. See id. at 255.

B. 42 U.S.C. § 1983 Claim for Deprivation of First Amendment Rights

Testa claims he was fired in retaliation for his comments to City Council concerning control of Airport parking by the City Parking Authority and inclusion of the Airport in the City's emergency communications system, in violation of his First Amendment rights to free speech and 42 U.S.C. § 1983. "A state cannot lawfully discharge an employee for reasons that infringe upon that employee's constitutionally protected interest in freedom of speech." Feldman v. Philadelphia Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994). All defendants seek summary judgment on this claim; defendants Street and Franklin-Suber also claim qualified immunity.

A public employee's claim of retaliation for engaging in

protected activity must be evaluated under the three-step process set forth in Pickering v. Board of Educ., 391 U.S. 563 (1968). See Baldassare v. New Jersey, 250 F.3d 188, 194-5 (3d Cir. 2001); see also Rankin v. McPherson, 483 U.S. 378 (1987); Connick v. Myers, 461 U.S. 138 (1983); Lewis, 165 F.3d at 162.

> First, plaintiff must establish the activity in question was protected. For this purpose, the speech must involve a matter of public concern. Once this threshold is met, plaintiff must demonstrate his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees. These determinations are questions of law for the court.
>
> If these criteria are established, plaintiff must then show the protected activity was a substantial or motivating factor in the alleged retaliatory action. Lastly, the public employer can rebut the claim by demonstrating it would have reached the same decision ... even in the absence of the protected conduct. [These determinations] present questions for the fact finder ...

Baldassare, 250 F.3d at 194-5 (internal quotations and citations omitted); see also Holder v. City of Allentown, 987 F.2d 188 (3d Cir. 1993).

1. Was Testa's Speech on a Matter of Public Concern?

An employee's speech addresses a matter of public concern when it may be "fairly considered as relating to any matter of political, social, or other concern to the community. ... The form and context of the speech may help to characterize it as relating to a matter of social or political concern to the community if, for example, the forum where the speech activity

takes place is not confined merely to the public office where the speaker is employed." Holder, 987 F.2d at 195 (citing Connick, 461 U.S. at 146). Testa's comments about inclusion of the Airport in the City's 800 MHZ emergency radio system and his opposition to the Parking Authority's control of parking at the Airport were comments on public safety and allocation of community resources made to the City Council: they were on both matters of public concern.

2. Does the Value of Testa's Speech Outweigh the City's Countervailing Interests?

The "conclusion that ... speech was on a matter of public concern does not alone determine that the speech was protected by the First Amendment. [Courts] must weigh the interests on behalf of the speech against the interest of the City as an employer in promoting the efficiency of the public services it performs through its employees." Watters v. City of Philadelphia, 55 F.3d 886, 895 (3d Cir. 1995), citing Rankin, 483 U.S. at 388. Only if the value of the speech, measured by the employee's interests in speaking and the public's interests in hearing him, is "outweighed by the government's interest in effective and efficient provision of services" is the speech unprotected. Azzaro v. County of Allegheny, 110 F.3d 968, 980 (3d Cir. 1997) (en banc).

Disruptions in working relationships and public management

caused by a top employee's speech may severely burden efficient government and render the speech unprotected. See Watters, 55 F.3d at 895. The "paradigmatic" case is Sprague v. Fitzpatrick, 546 F.2d 560 (3d Cir. 1976), cert. denied, 431 U.S. 937 (1977). See Watters, 55 F.3d at 898. In Sprague, the first assistant district attorney publicly impugned the integrity of the district attorney. Dismissal of the assistant was justified because his speech destroyed the close working relationship between the district attorney and his "alter-ego". The Court of Appeals emphasized that the assistant was a high official working directly for the superior whom he criticized: "The crucial variant in [the Pickering] balance appears to have been the hierarchical proximity of the criticizing employee to the person or body criticized." Sprague, 546 F.2d at 564, explaining Pickering, 391 U.S. 563; see also Watters, 55 F.3d at 896.

Testa relies upon the contrary example of Baldassare, 250 F.3d. at 198-99. Baldassare's speech was protected because, unlike plaintiff Sprague, Baldassare was not the "alter ego" of the superior whom he criticized, there was not a very close working relationship, and he had not impugned his superior's integrity. Accord Watters, 55 F.3d at 898 (speech protected where there was no suggestion of a close working relationship between plaintiff police official and commissioner who fired him, plaintiff was removed from commissioner in the chain of command,

and plaintiff did not impugn the integrity of the commissioner).

Testa did not enjoy a close working relationship with the Mayor; he testified they have never met or spoken. Nor did he personally attack the Mayor at any time; he merely criticized City policy. But, like the assistant district attorney in Sprague, Testa was a high official, directly below the Mayor in the City hierarchy and the Mayor's public alter-ego concerning Airport policy. According to the Aviation Director's job description,

> The Aviation Director ... directs the development, planning, operation and administration of all activities of the Division of Aviation. Plans, establishes, directs and controls ... the policies of the Philadelphia Airport system. Directs the coordination and implementation of divisional operations to ensure the safety, security and convenience of the traveling public and compliance with federal and state laws and regulations. Serves as the city's chief aviation administrator ... Advises and assists the Mayor and City Council in developing programs and practices ..."

Pl. Mem. of Law Ex. 12 at CTY01128. Under Pickering, Sprague, and their progeny, courts balance competing interests to determine if a public employee's critical speech is so disruptive it justifies dismissal. By the nature of a balancing test, one factor may mandate the outcome.

Testa was the Mayor's top aviation official, on whom the Mayor relied to carry out his policies. Where a top City official, subordinate only to the Mayor, publicly attacks the Mayor's policies, he disrupts the efficient implementation of

those policies. "The reason is self-evident. High-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal, cooperative, willing to carry out their supervisors' policies, and perceived by the public as sharing their superiors' aims." Poteat v. Harrisburg Sch. Dist., 33 F. Supp. 2d 384, 394 (M.D. Pa. 1998) ("In determining whether the government's interest in efficiency or effectiveness outweighs the value of the speech, we may also take into account the position the employee holds. A policymaker has substantially less First Amendment protection than does a lower level employee."). See also Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 970-73 (7th Cir. 2001) (in Pickering retaliation case, "the First Amendment does not prohibit the discharge of a policy-making employee when that individual has engaged in speech on a matter of public concern in a manner that is critical of superiors or their stated policies"); McVey v. Stacy, 157 F.3d 271, 278 (4th Cir. 1998) ("a public employee[]who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee."); Moran v. Washington, 147 F.3d 839, 850 (9th Cir. 1998) ("we are most doubtful that the Constitution ever protects the right of a

public employee in a policymaking position to criticise her employer's policies or programs simply because she does not share her employer's legislative or administrative vision"); Kinsey v. Salado Independent School Dist., 950 F.2d 988, 996 (5th Cir. 1992) (en banc) (little evidence is necessary to demonstrate workplace disruption when a retaliation plaintiff's position is high-level and confidential); Hall v. Ford, 856 F.2d 255, 261 (D.C. Cir. 1988) ("the higher the level the employee occupies, the less stringent the government's burden of proving interference with its interest").[1]

The public's interest in hearing Testa's views on aviation policy was not great enough to outweigh the government interest in efficient public management. Cf. Azzaro, 110 F.3d 968 (public interest in reports of sexual harassment outweighed any countervailing government interest). He was not speaking as a whistleblower to reveal corruption or wrongdoing; he stated his

[1]Testa, citing Hauge v. Brandywine Sch. Dist., 131 F. Supp. 2d 573, 581-83 (D. Del. 2001) (denying summary judgment against a plaintiff who claimed he had no real policymaking authority), argues he did not actually formulate policy. In the Pickering context, other courts have held "[a] policy-making employee is one whose position authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement ..." Vargas-Harrison, 272 F.3d at 972. It is not necessary to determine if Testa actually set policy. It is undisputed that Testa was a top City official, responsible for implementing Airport policy, who reported only to the Mayor; that is sufficient to tilt the Pickering balance against him, permitting his dismissal on these facts.

view about policy matters on which reasonable minds could disagree. In short, Testa has a constitutionally protected right to disagree publicly with the Mayor on policy, but not to do so as one of the Mayor's top employees. Accord McAuliffe v. Mayor, etc., of New Bedford, 29 N.E. 517 (Mass. 1892) (Holmes, J.) (policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"). Testa's retaliation claim fails as a matter of law.[2]

---

[2]Defendants argue Testa's defamation claim should be analyzed not under Pickering but under Rutan v. Republican Party, 497 U.S. 62 (1990), Branti v. Finkel, 445 U.S. 507 (1980), and Elrod v. Burns, 427 U.S. 347 (1976), which concern the rights of public employees dismissed because of their political affiliation rather than their speech. Citing this line of authority, defendants argue the Mayor may fire a high-ranking "policymaker" whenever he states disagreement with the Mayor's policies, regardless of the policymaker's political affiliation. Accord Wilbur v. Mahan, 3 F.3d 214, 218 (7th Cir. 1993) ("Once the employee is classified as [a policymaker], he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently."). This argument is colorable in theory; policy disagreement is closely related to political affiliation.

Testa, arguing his retaliation claim should survive summary judgment under an Elrod/Branti analysis, disputes he was a "policymaker." In the political affiliation cases, a "policymaker" is defined as an employee who "has meaningful input into decision making concerning the nature and scope of a major program," Brown v. Trench, 787 F.2d 167, 169-70 (3d Cir. 1986), not an employee with nondiscretionary responsibilities, id. at 167. See also Assaf v. Fields, 178 F.3d 170, 176 (3d Cir. 1999); Peters v. Delaware River Port Auth., 16 F.3d 1346, 1353 (3d Cir. 1994). The Aviation Director's job description, supra, is relevant in determining whether Testa was a policymaker. See Peters, 16 F.3d at 1357. Under the job description, the Aviation Director plans, establishes, directs and controls policies of the Philadelphia Airport system while advising the Mayor and City Council concerning the policies. Even if Testa's policy advice was never favorably taken, he was a policymaker with limited

C. Moot Retaliation Arguments

The third question under Pickering, whether Testa's speech was a substantial factor in his dismissal, need not be addressed: assuming Testa was fired in retaliation for his statements on Airport parking and inclusion of the Airport in the City's emergency communications system, he has no cognizable claim under Pickering. Similarly, defendants' arguments seeking qualified immunity to Testa's retaliation claim are moot.

D. Loss of Consortium Claim

Mrs. Testa claims she has been deprived of the comfort and companionship of her husband as a result of all defendants' conduct. "Under Pennsylvania law, a wife's consortium claim derives only from the injured husband's right to recover in

---

First Amendment protection under the Elrod/Branti line of cases.

Summary judgment against Testa on his retaliation claim would be appropriate under the Elrod/Branti analysis, but the Court of Appeals for the Third Circuit has consistently applied the Pickering test in claims of retaliation for specific instances of speech. See Baldassare, 250 F.3d at 194-5 ("public employee's retaliation claim for engaging in protected activity must be evaluated under [the Pickering] three-step process"); see also Lewis v. Cowen, 165 F.3d 154, 162 (2d Cir. 1999) ("Where the discharge is based on discrete incidents of speech rather than political affiliation, Pickering, not Branti and Elrod, provides the appropriate framework of analysis."), cert. denied, 528 U.S. 823 (1999). But cf. Fazio v. City & County of San Francisco, 125 F.3d 1328 (9th Cir. 1997) (following Elrod, district attorney could fire assistant who announced his candidacy against the district attorney); Warzon v. Drew, 60 F.3d 1234 (7th Cir. 1995) (employing Elrod/Branti analysis; holding county could dismiss policymaker who repeatedly and publicly voiced opposition to a county policy).

tort." Wakshul v. City of Philadelphia, 998 F. Supp. 585, 590 (E.D. Pa. 1998); see also Murray v. Commercial Union Ins. Co. (Commercial), 782 F.2d 432, 438 (3d Cir. 1986). "[W]here the allegedly injured spouse fails to plead a cognizable claim, his spouse's claim for loss of consortium cannot survive." Quitmeyer v. Southeastern Pennsylvania Transp. Authority, 740 F. Supp. 363, 370 (E.D. Pa. 1990).

Testa has no cognizable tort claim against the City and Mayor Street, so Mrs. Testa's loss of consortium claim against those defendants fails as a matter of law.

III. CONCLUSION

Testa's 42 U.S.C. § 1983 claim for deprivation of First Amendment rights fails as a matter of law. Mrs. Testa's claim for loss of consortium against the City and Street fails as well. Summary judgment will be granted in favor of all defendants on Count III and in favor of the City and Street on Count X of the Amended Complaint. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALFRED TESTA, JR.	:	**CIVIL ACTION**
and KATHRYN H. TESTA	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA and	:	
JOHN F. STREET, MAYOR, in his	:	
Official and Individual capacities	:	
and **STEPHANIE FRANKLIN-SUBER** in	:	
her Official and Individual	:	
capacities	:	**NO. 00-3890**

ORDER

AND NOW, this day of May, 2002, after a hearing and upon consideration of the parties' briefs, it is **ORDERED** that:

1. Defendants' Motion for Summary Judgment on Plaintiff's Retaliation Claim [#34] is **GRANTED**. Count III of plaintiffs' Amended Complaint [#13] is **DISMISSED WITH PREJUDICE**. Count X of plaintiffs' Amended Complaint [#13] is **DISMISSED WITH PREJUDICE** as against Defendants Mayor John F. Street and the City of Philadelphia.

2. Defendant Stephanie Franklin-Suber's Motion for Summary Judgment [#31] is **GRANTED IN PART**. Count III of plaintiffs' Amended Complaint [#13] is **DISMISSED WITH PREJUDICE**. Franklin-Suber's Motion for Summary Judgment [#31] on Counts VII, VIII and X of plaintiffs' Amended Complaint [#13] is **HELD UNDER ADVISEMENT**.

_____
Norma L. Shapiro, S.J.